Supreme Court, U.S.
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No._____

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IN THE
SUPREME COURT OF THE UNITED STATES

TERRY R. BEARDSLEE,

PETITIONER,

-v-

THE GOVERNMENT AGENT:
WASHINGTON STATE- DSHS
and YEN LAWLOR, individual,
and DALE T. WAGNER, individual,
and an unknown number of John Does
and an unknown number of Jane Does

RESPONDENTS,

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TERRY R. BEARDSLEE, DVM,
Pro Se, Petitioner
P.O. Box 3642
Chula Vista, CA 91909

December 8, 2000

26 pp

QUESTIONS PRESENTED
(INTRODUCTION)

On July 26, 2000, the United States Court of Appeals Ninth Circuit(USCA9C) declared arbitrarily within their opinion " Beardslee's citation to *Moore v. City of East Cleveland*, 431 US 494, 499 (1977) is inapposite because Beardslee's assistance in the abduction of his nephew does not create a cognizable family relationship." In other words, the USCA9C found a crime when none existed as no arrest, charge, indictment, trial, or conviction of said criminality in the lower courts. All other privileges ordinarily dissolved upon conviction of a serious criminal felony remain intact as the right to vote and right to firearms.

During the course of the proceedings in the United States District Circuit Court (USDCC), there were arbitrary incidents of irregularities which were also appealed. Such as, the refusal to recognize the United States Supreme Court (USSC) findings in *D.C. Court of Appeal v. Feldmen,* 460 U.S. 462 (1983.) Further, USDCC refusal to grant a motion to amend, and the imposing of discovery sanctions in contradiction to the USSC determination in *Harlow v. Fitgerald,* 457 U.S. 815, 818 (1982). USDCC also failed to recognize a timely amended caption, and service, which too were appealed as contrary to USSC for a pro se pleading in *Boag v. MacDougall,* 454 U.S. 364, 365, (1982). The USCA9C affirmed USDCC granting of summary judgment in favor of the respondents on all issues. On September 18, 2000, a petition for motion to rehear, en banc was denied.

The decisions present the following question:

1. Does the arbitrary decision to charge, convict, and sentence petitioner of a criminal felony during a civil appeal proceeding exceed the fundamental rights guaranteed in the fifth, sixth, eighth and fourteenth amendments?

2. Does the USSC decision in *Moore v. City of East Cleveland*, Id, define family members due constitutional protection rights from unreasonable interference from the state apply only to those not convicted of a crime?

3. May a federal district court, or federal appeal court arbitrarily review the final determinations of a state?

4. Did the entered arbitrary decisions by USAC9C with regard to federal questions conflicted with relevant decisions of the USSC in particular yet not limited to *Moore v. City of East Cleveland*, Id, *D.C. Court of Appeal v. Feldmen*, Id, *Boag v. MacDougall*, Id, and *Harlow v. Fitgerald*, Id as argued against expressly by Dr. Beardslee in the lower courts ?

The supra posed questions are based on entered arbritary decisions by USAC9C regarding important federal questions. The USAC9C decided these important questions in a manner that conflict with decisions of other United States court of appeals and the USSC and so call for an exercise of the Supreme Court's supervisory power.

PARTIES TO THE PROCEEDING

Petitioner:

The petition for a Writ of Certiorari is brought by Dr.Terry Beardslee, pro se.

Respondents:

The respondents are Washington State Department of Social and Health Services (WA-DSHS), Yen Lawlor, and Dale Wagner, all, last known to be represented through and by attorney Susan M. Edison, assistant attorney to state attorney general of Washington.

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PETITION FOR WRIT OF CERTIORARI

Dr. Terry R. Beardslee respectfully petitions for a Write of Certiorari to review the decisions of the United States Court of Appeals Ninth Circuit.

OPINION BELOW

On June 24, 1999, the United States District Circuit Court (USDCC) granted summary judgment in favor of the respondents.

On July 19, 1999, Dr. Beardslee appealed.

On July 26, 2000, the United States Court of Appeals for the Ninth Circuit (USCA9C), affirmed the summary judgment in a not for publication memorandum (reprinted in Appendix 1-2).

On August 3, 2000, Dr. Beardslee filed a motion rehearing, en banc, and a motion to stay mandate.

On September 18, 2000, the motion rehearing, en banc, and a motion to stay mandate in the USCA9C, were also denied (reprinted in Appendix 3).

JURISDICTION

The United States Supreme Court has jurisdiction according to Rule 10 and 13 of its rules, and pursuant to 28 USSC ξ 1254,see order supra. Notifications pursuant Rule 29.4 (b) or (c) are not required.

STATEMENT OF THE CASE

The original complaint alleged prior to any hearings that due to the failure of investigation by Washington-DSHS and its agents Yen Lawlor and Dale Wagner, that Dr. Terry Beardslee's (Dr. Beardslee) pre-existing family unit was dissolved when Josiah Beardslee, a child of tender years was removed from the domicile without cause by said state and agents. In so doing, the right to privacy, intimate association and family integrity protected by the Due Process Clause of the 14th Amendment to the United States Constitution, and 42 U.S.C. § 1983 and *Moore v. City of East Cleveland*, 431 US 494, 499 (1977) was violated without justification of any legitimate state interest.

During discovery, Dr. Beardslee, was unable to attend a notice of dispositions as the party Dale Wagner (Wagner), an attorney general for the state of Washington, procured a restraining order through connections of a previous co-worker, who at time of depositions was a magistrate for a state court.

The restraining order required jail if Dr. Beardslee attended depositions. The USCA9C did not consider Wagner's behavior by a state actor as violating the Due Process Clause of the fourteenth amendment as intended to secure an individual from an abuse of power by government officials.

Rather the lower court ruled, a formal pleading entitled Motion for Protection Order was required by the

BEST AVAILA

pro se party, Dr. Beardslee. Further, the lower USDCC order dated September 18, 1998, stated within its body " all discovery was to allow availability for timely answer and discovery is to be terminated Thursday, December 31, 1998."

REASONS FOR GRANTING THE WRIT

Because of the strategic timing by respondents in filing their Notice of Deposition, no formal entitled Motion for Protection could be filed pursuant to CR7(d).[1] The required third Friday to file a formal Motion for Protection against depositions to prevent jail fell on Friday, January 1, 1999, post the discovery deadline. A motion for shorten time pursuant to local CR 6(e) was not available. Motion Shorten Time, pursuant to CR 32(a)(3)(E) only allowed if received in eleven days or less to file a formal entitled protective order pursuant to CR 26(c)(2). The Notice of Depositions was found by the USDCC as received by plaintiff twelve days prior. The Notice of Objection as filed by Dr. Beardslee remained the only remedy and was sufficient. As, Rule 37(d) does not authorize an award of sanctions unless there is a total failure to respond to the discovery requests. See *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1339-40 (9th Cir. 1985) cited in *Badalamenti v. Dunham's*, 896 F.2d 1359 (6th Cir. 1990). USCA9C arbitrarily misapplied the court in *Fjelstad.*

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1. CR7(d)When there has been an adverse appearance, and unless otherwise provided by rule or court order, motions shall be noted for consideration for the third Friday after the motion is filed.

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Also, the lower federal courts applied the standard of reasonable notice not proper notice which was timely objected. *Estrada v. Rowland,* 69F.3d 405(1995).

The Notice of Objection filed by Dr. Beardslee satisfied a filing of a protection motion pursuant to the court's own rules, CR 7(b)(5)[2]; and more importantly, the USSC precedent instructs federal courts to construe pro se pleadings liberally see *Boag v. MacDougall,* 454 U.S. 364, 365, (1982).

Lastly, the notice of depositions were inappropriate as respondents had pending a summary motion alleging qualified immunity." Until this threshold immunity question is resolved discovery shall not be allowed. "*Harlow v. Fitgerald* 457 U.S. 815, 818 (1982); cited in *Siegret v. Giley,* 500 U.S. 226 (1991).

As to amending the complaint, USCA9C points to *Allen v. City of Beverly Hills,* 911 F.2d 367, 373 (9th Cir. 1990) inappropriately for the case referes to " If the proposed amended complaint cannot withstand a motion to dismiss, then the amendment should be denied as futile". Here, the motion to dismiss stood attack, rather a summary motion was arbitrarily granted against the petitioner, Dr. Beardslee.

The USCA9C yet again departed from the accepted and usual course of proceedings by a lower court when it failed to follow *Conley v. Gibson,* 355 U.S. 41, 47 (1957) with regard to the party of Wagner.

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2. CR7(b)(5) Objections. "Motions" as used herein, shall include objections

Wagner filed an affidavit during the course of the lower court proceedings as such admitted to be fairly on notice to the proceeding against him which is all that is required. See *Conley v. Gibson,* Id.

A finding of lack of service is in conflict of other United States court of appeals and decisions within its own circuit. First, the lower court arbitrarily refused the request by Dr. Beardslee for materials as required by the local rules for service upon a party when proceeding pro se. So rather, the required re-service of Wagner by the court by Dr. Beardslee was prevented. Secondly, any defective service of complaint by a pro se litigant does not warrant dismissal in other ninth circuit cases. *Garaux v. Pulley,* 739 F. 437, 439 (9th Cir 1984). Lastly, other circuit courts have found personal liability even though complaint named defendants "not as individuals but under the color and pretense of the statutes, regulations, customs and usages of the State", *Brunken v. Lance,* 807 F.2d 1325, 1329 (7th Cir. 1986).

The lower courts admits their decision is arbitrarily based on a declaration of the attorney for the respondents rather, than as required from the facts set forth in the complaint by Dr. Beardslee being liberally construed. See *Frey v. City of Herculaneum,* 44F.3d, 667, 671(8th Cir. 1995). As such, the reference to custody proceedings, rather than the gravamen of the complaint. The complaint as written involves the destruction of the pre-existing family unit by respondents failure to investigate properly prior to removal of Josiah from Dr. Beardslee.

Washington state recognizes a cause of action for negligent investigation of possible child abuse. *See Lesley v. DSHS, 83 Wn. App. 263 ,272-73, 921 P.2d 1066 (1996)* As such, the lower courts were not on point looking at custody issues rather than the pre-existing family unit reference to *Moore, Id.* as sited in *Mullins v. Oregon,* 57 F. 3d. 789, 794-97 (9th Cir. 1995), see in Appendix 2. In any case, USCA9C arbitrarily concluded the exclusion of Dr. Beardslee from all court proceedings inspite of the Washington Court of Appeals finding to the contra and an order from state court acknowledging Dr. Beardslee's parental rights. See, *Doe v. Hennepin County,* 858 F. 2d 1325, 1329 (8 th Cir. 1988).

Finally, the lower courts briefly addressed the issue of *Moore,* Id. But, the USCA9C sus sponte found Dr. Beardslee guilty of a serious criminal felony. The same federal court, imposed the sentence to dissolve the pre-existing family of uncle and nephew for said crime.There is no more a crime than the then violation of an ordinance as in *Moore,* Id., however the lacking of due process.

USCA9C improperly gave effect to a Washington juvenile court order which had ruled on constitutional issues. The Washington Juvenile Court on November 4, 1996 never considered the constitutional claims, nor could it. *Adams v. Oregon State Children's Serv. Div.,* 886P. 2d pp 22-23 holding a juvenile court has no jurisdiction to consider constitutional claims. See *Mullins v. State of Oregon,* Id.

Secondly, the Virginia Court of Appeals entered a final order shortly after July 15, 1997 which overruled the

Washington juvenile court order indicating no notice.

Lastly, the order of November 15, 1993 as amended in May 1995 without due process makes it void. *In re Thorensen,* 46 Wn. App. 493, 730 P.2d 1380 (1987). A foreign judgment is not binding if it is made to appear that it was rendered without jurisdiction over the person sought to be bound. *May v. Anderson Ohio,* 73 S. Ct 840, 345 U.S. 528, 97 L. Ed 221(1958). Josiah and Dr. Beardslee were a pre-existing family unit prior to any alleged abduction and according to law afterwards.The facts unlike alleged by USCA9C do not support otherwise.

As such, the USCA9C reviewed and found contra to final state court rulings, even though said lower court recognizes the USSC does not allow. " We recognize a federal district court, as a court of original jurisdiction, may not review the final determinations of a state court. See, e.g., *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 , 103 S.Ct. 1303, 1311-12 (1983); This is true even when federal constitutional issues are at stake. See *Worldwide Church of God v. McNair,* 805 F.2d 888, 891 (9th Cir. 1986) sited in *Mullins v. State of Oregon,* Id. The USCA9C is arbritarily selective in their respect to the *Mullins* court determinations.

No order exists in the lower federal or state court which charges much less convicts Dr. Beardslee of assistanced abduction. In a Federal Court according to the fifth amendment, a person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument. *Stirone v. United States,* 361 U.S. 212 (1960). No such instrument exists.

The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action; it requires an actual jury finding of guilty. See *Bollenbach v. United States,* 326 U.S. 607, 614, (1946). cited in *John Sullivin v. Louisiana,* 61 U.S.L.W. 4518 (1993)

Further, the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." In *Duncan v. Louisiana,* 391 U.S. 145, (1968), it is found the right to trial by jury in serious criminal cases to be "fundamental to the American scheme of Justice," and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the Judge, reach the requisite finding of "guilty." See *Sparf and Hansen v. United States,* 156 U.S. 51, 105-106, (1895) sited in *John Sullivin v. Louisiana,* supra. The three panel of judges are not by any stretch of the imagination a jury. The fundamental rights of the fifth and sixth amendment have been denied to the petitioner, Dr. Beardslee.

Further, the lower courts expressly states a crime dissolves a pre-existing family and *Moore,* Id., does apply. The USSC disagrees see *Moore,* Id., and supra.

For arguendo, if a conviction could be found by the three judge panel and the ninth circuit court having supported such a finding refusing a motion for en banc, the sentence is grossly disproportionate to the severity of the crime. See, *Harmelin v. Michigan,* 501 U.S. 957(1991). The dissolve of a constitutional right without the afforded constitutional protections is grossly disproportionate.

The courts do not support the dissolve of the family without due process of law minimum notice and opportunity to be heard, see *In re Hansen*, 24 Wn. App. 27, 599 P.2d 1304 (1979); *In re Thorensen*, 46 Wn. App. 493, 730 P.2d 1380 (1987) and *Cain v. Commonwealth*, 402 S.E.2d 682, 12 Va. App.42.

The Due Process Clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process. *Griswold v. Connecticut, 381 U.S. 479, 501.*

There is a body of law holding that state law may create a " liberty interest" protected by the Fourteenth Amendment. If, for example, a state statute gives specific directives to the decision maker that if the (statute's) substantive predicates are present, a particular outcome must follow, a " liberty interest"protected by the Fourteenth Amendment is created, see *Bagley v. Rogerson ,5 F.3d 325, 328 (8th Cir 1993)..*[3,4]

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[3] "Family Unit" - Under RCW 13.34.020 , provides that the family unit should remain intact in the absence of compelling evidence to the contrary, a "family unit" may encompass a child's relationship with parties who, although not the biological parents, have acted as the child's parents.*In re Hansen, 24 Wn. App. 27, 599 P.2d 1304 (1979).*Yen Lawlor alleged abuse without compelling evidence to corroborate proof nor allegations of assistance in abduction. The assistance of abduction conviction occurs in USCA9C.

[4] JuCR 2.2(a) and RCW 13.34.060 provide for release of a child when shelter care is without court order and no dependency petition is filed within 72 hours of custody. *In re Brown, 29 Wn. App. 744, 631 P.2d 1 (1981).* Lawlor, DSHS , and Wagner refused.

The USSC interpreted the Due Process Clause of the fourteenth Amendment to include a substantive component that protects certain individuals liberties from state interference, no matter what process is given, unless the infringement is narrowly tailored to achieve a compelling state interest. *See Reno v. Flores 113 S.Ct.1439, 1447, 123 L. Ed 2d 1(1993)*

A state has no interest in protecting a child from his family unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse. *See Lehr, 103 S* Ct. at 2990 (declaring liberty interests in preserving the family unit " are sufficiently vital to merit constitutional protection in appropriate cases (emphasis added); accord *Myers v. Morris 810 F.2d1437, 1462 (8th Cir 1987).*

In May 1995, it was clear that a constitutionally protected family right existed and that right can not be deprived without notice and hearing except case of imminent danger to the child, see *Caldwell v. Lefaver, 928 F. 2d 331, 333(9th Cir 1991).*

On May 24, 1995, Josiah was removed due to an intaker report from White, without court order. No notice or hearing exists for the family unit of Terry and his nephew Josiah in the immediate case. The removal in the first instance regarding Terry and Josiah was without reasonable grounds. A tip may justify investigation but will not provide reasonable grounds for removal of a family member absent independent,

of reliability; and certainly not when all evidence is to the contrary. *Alabama v. White, 496 U.S. 325, 328, 110 SCt 2412, 2415(1990)* also see *United States v. Robertson 90 F. 3e 75, 78(3rd Cir 1996).*

Lawlor, and Wagner could not and did not further corroborate. The CPS report within its body states there are no risk factors placing Josiah in danger of imminent harm. On June 2, 1995, the emergency physical exam after removal indicated "appropriate care" as such required Josiah's return. On June 6, 1995, Yen Lawlor possessed no evidence beyond White and lacked any corroboration of evidence of abuse against Dr. Beardslee. Further, Josiah testified to the fact any abuse only came from his biological father. Lawlor was not entitled to rely on the unknown credibility of informant (White) unless she could corroborate the information through other sources which would have reduced the chance that the informant was recklessly relating incorrect information or purposely distorting information.

Lawlor and Wagner with deliberate indifference and bad faith did not consider or relate the findings of Josiah's emergency exam medical report at any time. Lawlor and Wagner having filed no pleadings such as petition etc.,controlled the flow of information to the court.The information may, which it did not in this case, justify investigation but will not provide reasonable grounds for removal of a family member absent independent articulable criteria of reliability, see supra, *Alabama*. It was known at the time, a dependency proceeding is designed to protect children, to help parents alleviate problems,

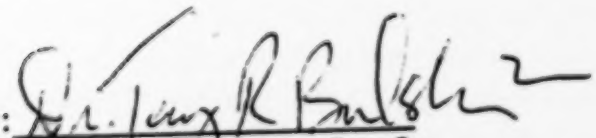
and to reunite families (emphasis added). *In re Dependency of K.R., 75 Wn. App. 781, 880 P.2d 88 (1994).* This gives a duty to investigate for placement to maintain the fundamental constitutional right to the family unit.

Contra to the arbritary findings in the lower court, even if respondents had a right to take temporary custody of Josiah from the uncle without order or otherwise, and the plaintiff doesn't state repondents did, respondents had a corresponding obligation to afford Dr.Beardslee an adequate post-deprivation hearing, *Doe v. Hennepin County, 858 F. 2d 1325, 1329(8 th Cir. 1988)* sited holding that an alleged abuser had a clearly established right to notice and a hearing before the state removed children cited in *Ram v. Rubin, 118 F. 3d 1306, 1310 (9th Cir 1997).*

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted on December 8, 2000,

By: 

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UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

App1 FILLED JUL 26 2000

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY BEARDSLEE,
Plaintiff-Appellant

v.

DEPARTMENT OF SOCIAL & HEALTH SERVICES STATE OF WASHINGTON; YEN LAWLOR, Division Child Protective Services
Defendants-Appellees

No. 99-35752

MEMORANDUM [1]

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding
Submitted July 17, 2000 [2]

Before: KOZINSKI, T.G. NELSON AND SILVERMAN, CIRCUIT JUDGES

Terry Beardslee appeals pro se the districts court's summary judgment in favor of defendants in his 42 U.S.C. §1983 action based on the defendants' involvement in child custody proceedings regarding Beardslee's nephew. We have jurisdiction under

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3

2 The panel unanimously finds this case suitable for decision without oral argument. See Fed.R. App.P. 34(a)(2). Accordingly, Beardslee's request for oral argument is denied.

28 U.S.C.ξ 1291. We review de novo the summary judgment order, see *Margolis v. Ryan,* 140 F. .3d850, 852(9th Cir 1998), and we affirm.

The district court properly concluded that Beardslee did not have a constitutional right to be involved in the court proceedings regarding his nephew. Although parents have a constitutionally protected interest in the care, custody, and management of their children, see *Troxel v. Granville,* 120 S. Ct 2054,2060(2000), this right has not been extended to kindred, see *Mullins v.Oregon,* 57 F. 3d. 789, 794-97 (9th Cir. 1995). Beardslee's citation to *Moore v. City of East Cleveland,* 431 US 494, 499 (1977), is inapposite because Beardslee's assistance in the abduction of his nephew does not create a cognizable familial relationship.

The district court did not abuse its discretion when it denied Beardslee's motion for leave to amend his complaint because any amendment would have been futile. See *Allen v. City of Beverly Hills,* 911 F. 2d367, 373-74(9th Cir 1990) Additionally, the district court did not abuse its discretion when it imposed discovery sanctions against Beardslee when he failed to attend the scheduled depositions. See *Fjelstad v. American Honda Motor Co.,* 762 F. 2d 1334, 1337(9th Cir 1985). The district court also properly struck Beardslee's motion for entry of default against Dale T. Wagner because Wagner was not a named defendant in the complaint and he was not served with a summons or complaint in the instant action.

Finally, we deny Beardslee's motion opposing defendants' oral extension of time in which to file the answering brief.

AFFIRMED

App 3 FILLED SEP 18 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY BEARDSLEE,
Plaintiff-Appellant

v.

DEPARTMENT OF SOCIAL & HEALTH SERVICES STATE OF WASHINGTON; et al.,

Defendants-Appellees

No. 99-35752

ORDER

Before: KOZINSKI,T.G. NELSON AND SILVERMAN, CIRCUIT JUDGES

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied. Because appellant has failed to demonstrate that the matter involves a substantial question and good cause, appellant's motion to stay the mandate is denied. *See* Fed. R. App. P. 41(d)(2)(A).

No motions for reconsideration, rehearing, clarification, recall of the mandate, or any other submissions shall be filled or entertained in this closed docket.